STATE OF MICHIGAN

COURT OF APPEALS

HERSCHEL COHEN, RONALD HARLAN WOODY, III, CAROLE RYAN, SHARON DAY, DUANE RAYMOND, and SUSAN RAYMOND,

Plaintiff-Appellants,

and

ALAN LEVENSON, PETER JANSSEN, ANETTE JANSSEN, HELEN BARBARA SORENSEN, NELSON ROBERT PARDA, PAMELA J. MADDERN, JACK C. BLEVINS, JR., RICHARD ENGLISH, TOM UNGAR, DOUGLAS ULRICH, RHONDA ULRICH, MATTIE KING, EDWIN HUANG, BRIAN FALK, SHELDON SHERMAN, WOLFGANG ROSENFELDER, GREG LEROY, MELISSA LEROY, ANTHONY CASTELLANO, and JOANNE CASTELLANO,

Plaintiffs,

v

PARK WEST GALLERIES, INC., ALBERT SCAGLIONE, MORRIS SHAPIRO, ALBERT MOLINA, and PLYMOUTH AUCTIONEERING SERVICES, LTD.,

Defendant-Appellees.

UNPUBLISHED
April 5, 2012

No. 302746
Oakland Circuit Court
LC No. 2010-111282-CZ

Before: MURPHY, C.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order denying reconsideration of its order granting summary disposition in favor of defendants on the ground that all of plaintiffs' claims are subject to an arbitration agreement. Because we conclude that the only claims subject to arbitration are those arising from invoice agreements containing an arbitration clause, we reverse and remand for further proceedings consistent with this opinion.

I. FACTS & PROCEEDINGS

The instant lawsuit arises from artwork sales by defendants to plaintiffs. Each plaintiff purchased different works of art from Park West. The artwork was purchased at different times and from different locations. The art sales were made on about 20 different cruise ships, and at land auctions in Michigan, California, Georgia, Texas, and Ohio. The purchases at issue in this case span several years, the first occurring in May 2001 and the last in February 2010. Each purchase was made pursuant to an invoice agreement that was signed by the purchaser. Park West also provided each purchaser with a certificate of authenticity signed by one of the individually named defendants, and an appraisal allegedly proving the value and authenticity of the artwork.

Some of the invoice agreements contained agreements to arbitrate all claims against defendants, and some of the invoice agreements did not contain an arbitration clause. All six of the plaintiff-appellants in this case signed at least one invoice agreement containing the arbitration clause. When included in the invoice, the arbitration clauses were all identical. The arbitration agreement provided, in pertinent part, that "[a]ny disputes or claims of any kind including but not limited to the display, promotion, auction, purchase, sale or delivery of art, items, or appraisals shall be brought solely in nonbinding arbitration and not in any court or to any jury."

Plaintiffs filed a complaint on June 22, 2010, alleging fraud, conversion, violation of the Michigan Consumer Protection Act, breach of contract, violation of the Michigan Art Multiples Sales Act, negligent misrepresentation, conspiracy, unjust enrichment, negligence, intentional infliction of emotional distress, and breach of warranty of quality of fitness. Plaintiffs generally alleged that defendants sold forged and fake artwork, misrepresented the authenticity of artwork and artist signatures, mislead and specifically lied about the rarity and value of artwork, overvalued and falsely appraised artwork, used deceitful sales practices to sell artwork, and refused to provide refunds.

On July 14, 2010, defendants responded to plaintiffs' complaint by filing four motions to dismiss. Motion number one requested dismissal based on misjoinder of parties, motion number two requested dismissal pursuant to MCR 2.116(C)(7) because the parties agreed to arbitration, motion number three requested dismissal pursuant to MCR 2.116(C)(8), and motion number four requested dismissal of plaintiff Sharon Day because she previously brought an action against defendants regarding different artwork.

A hearing on defendants' motions was held on November 3, 2010. The trial court granted defendants' second motion and dismissed the case based on its determination that an agreement to arbitrate required dismissal pursuant to MCR 2.116(C)(7). The trial court found that the arbitration agreements signed by the plaintiffs were sufficiently broad to encompass all past and future claims against defendants because of the broad language used in the clause and because there was no language limiting the arbitration agreements to the single invoice where the agreement was set forth. Further, the trial court found that plaintiffs failed to present any authority to support making an exception for statutory and tort claims. Based on its decision to grant defendants' second motion, the trial court determined that defendants' fourth motion was

moot. Conforming orders were entered on November 3, 2010. The trial court took defendants' first and third motions under advisement.

Plaintiffs filed a motion for reconsideration on November 24, 2010. On December 27, 2010, the trial court issued an opinion addressing defendants' first and third motions to dismiss. The trial court determined that the parties were not joined properly and ordered severance of the parties, but not dismissal. The trial court granted in part and denied in part defendants' motion to dismiss pursuant to MCR 2.116(C)(8).[1] On February 11, 2011, the trial court issued its opinion denying plaintiffs' motion for reconsideration of the trial court's decision to dismiss the complaint based on the parties' agreement to arbitrate. The trial court noted that plaintiffs' arguments for reconsideration were "reiterations" of their arguments opposing summary disposition.

II. SCOPE OF THE ARBITRATION CLAUSE

On appeal, plaintiffs first argue that the trial court erred when it concluded that the arbitration clause in some of the invoice agreements was sufficiently broad to encompass all claims brought by plaintiffs against defendants regardless of whether the claims arose from a purchase completed pursuant to an invoice agreement containing an arbitration clause. Plaintiffs also argue that even if their claims are subject to arbitration, their statutory and tort claims are not within the scope of the arbitration agreement.

We review a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo. *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010). Pursuant to MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred because of an agreement to arbitrate. Whether an issue is subject to arbitration is also reviewed de novo. *In re Nestorovski Estate*, 283 Mich App 177, 184; 769 NW2d 720 (2009).

The arbitrability of a particular issue is determined by applying a three-part test: "(1) is there an arbitration agreement in a contract between the parties; (2) is the disputed issue on its face or arguably within the contract's arbitration clause; (3) is the dispute expressly exempted from arbitration by the terms of the contract." *Id.* at 202 (quotation and citation omitted). Arbitration is favored, and doubts regarding the arbitrability of an issue should be resolved in favor of arbitration. *Id.*; *Hall v Stark Reagan, PC*, __ Mich App __, slip op at 6; __ NW2d __ (issued September 13, 2011).

"An agreement to arbitrate is a contract." *City of Ferndale v Florence Cement Co*, 269 Mich App 452, 458; 712 NW2d 522 (2006). Accordingly, we apply the same legal principals as those that govern contract interpretation to the interpretation of an arbitration agreement. "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. *Id.* The intent of the parties is ascertained according to the plain and ordinary meaning of unambiguous contract language. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503

[1] The trial court's decision in regard to defendants' first and third motions is not challenged on appeal.

(2007). Contract language should be read in context. See *Shay v Aldrich*, 487 Mich 648, 665; 790 NW2d 629 (2010). We must interpret and enforce clear and unambiguous language as it is written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

The first factor, whether there is an arbitration agreement in a contract between the parties, *In re Nestorovski Estate*, 283 Mich App at 202, cannot reasonably be disputed in this case. Plaintiffs admit that some of the invoice agreements that were signed contained an arbitration clause. Accordingly, the first factor is satisfied at least in regard to some of the invoice agreements. Similarly, the third factor, whether the dispute is expressly exempted from arbitration by the terms of the contract, *id.*, is not disputed because plaintiffs' claims are not expressly exempted by the terms of the arbitration clause.

At issue in this case is the second factor, whether the disputed issue is on its face or arguably within the contract's arbitration clause. *Id.* The disputed issues all relate to the artwork sold by defendants to plaintiffs, and the specific issue is whether claims regarding artwork sold pursuant to an invoice agreement without an arbitration clause can still be subject to arbitration based on a subsequent invoice agreement containing an arbitration clause. The arbitration clause in this case states in pertinent part: "Any disputes or claims of any kind including but not limited to the display, promotion, auction, purchase, sale or delivery of art, items, or appraisals shall be brought solely in nonbinding arbitration and not in any court or to any jury." The trial court agreed with defendants and concluded that when plaintiffs agreed to arbitration of "any disputes of any kind," they agreed to arbitrate any dispute arising from past purchases, even if those purchases were made pursuant to invoice agreements that did not contain an arbitration clause. We disagree.

Michigan law generally requires that separate contracts be treated separately. See, e.g., *Seyburn, Kahn, Ginn, Bess, Deitch and Serlin, PC v Bakshi*, 483 Mich 345, 361; 771 NW2d 411 (2009); *Mich Nat'l Bank v Martin*, 19 Mich App 458, 462; 172 NW2d 920 (1969). In *Bakshi*, 483 Mich at 354, the Court considered the proper accrual date for a claim by an attorney against his client for unpaid legal fees. The Court concluded that the parties entered into two separate contracts, one contract for legal services, and one contract for additional services regarding file review. *Id.* at 357, 361. The Court explained that the "additional services rendered after the termination [of the attorney-client relationship] equate to a separate contract apart from the parties' original contract. This separate contract is not governed by the terms included in the original contract." *Id.* at 361. In *Martin*, 19 Mich App at 461, the issue was whether the mortgagees' foreclosure on one property precluded subsequent foreclosure upon additional property in another county. This Court concluded that "[e]ach mortgage instrument constituted a separate and distinct contract, capable of independent enforcement." *Id.* at 462.

Further, Michigan has long recognized the rule that contracts cannot be construed to operate retrospectively. See, e.g., *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 248; 760 NW2d 828 (2008); *In re Slack Estate*, 202 Mich App 627, 629; 509 NW2d 861 (1993).

We note that our analysis of basic Michigan law is consistent with the Restatement of Contracts, which similarly supports the conclusion that separate contracts are treated separately.

For example, comment d to Restatement Contracts, 2d, § 231, pp 197-198 provides in pertinent part:

> The rules that protect parties whose performances are to be exchanged under an exchange of promises apply only when the promises are exchanges as part of a single contract. . . . [I]f one or more promises by each party are not part of the consideration for one or more promises by the other party, there are instead separate exchanges. In deciding whether there is a single contract rather than separate contracts, the court must look to the actual bargain of the parties . . . to decide whether each promise on one side was sought and given as at least part of the exchange for each promise on the other side.

Similarly, comment b to Restatement § 240, p 230 provides in pertinent part:

> If there are two separate contracts, one party's performance under the first and the other party's performance under the second are not to be exchanged under a single exchange of promises, and even a total failure of performance by one party as to the first has no necessary effect of the other party's duty to perform the second.

In this case, the plain language of the invoice agreements that contain the arbitration clause does not reference past purchases between the parties. Further, the past purchases were of unique artwork presented by different salespeople, made pursuant to separate invoice agreements, at different times, in different places, and under different circumstances. Each time plaintiffs purchased artwork from defendants, plaintiffs signed an invoice agreement, and each invoice agreement is a separate contract between the parties. Plaintiffs did not have a continuous, uninterrupted business relationship with defendants; rather, plaintiffs happened to purchase artwork they believed was unique from different sales representatives of defendants on multiple, distinct occasions. Accordingly, purchases made pursuant to invoice agreements that did not contain an arbitration clause are not subject to arbitration because Michigan law treats separate contracts separately and disfavors retroactive application of contractual obligations. While the arbitration clause included in some of the invoice agreements is broad; it does not contain any language suggesting it was meant to apply to previous purchases made pursuant to different invoice agreements between the parties.

Defendants and the trial court specifically relied on the reasoning set forth in *Watson Wyatt & Co v SBC Holdings, Inc*, 513 F3d 646 (CA 6, 2008), to reach the conclusion that the arbitration clause in some of the invoice agreements bound the parties to arbitration regardless of whether the claims arose from invoice agreements that contained arbitration clauses. "Decisions from lower federal courts are not binding but may be considered persuasive." *Truel v City of Dearborn*, 291 Mich App 125, 136 n 3; 804 NW2d 744 (2010). In *Watson Wyatt*, F3d at 648, the court held that an arbitration agreement entered into by the parties compelled arbitration of a claim that arose from actions preceding the arbitration agreement. We do not find *Watson Wyatt* persuasive in this case because in *Watson Wyatt* the agreement containing the arbitration clause

was the only written agreement between the parties, whereas in this case, the parties entered into several written agreements, only some of which contained agreements to arbitrate. Accordingly, the circumstances in *Watson Wyatt* were different than those in this case.[2]

Plaintiffs also argue that to the extent any of their claims are subject to arbitration, their statutory and tort claims are not within the scope of the arbitration clause because the arbitration clause did not specifically include statutory and tort claims.[3] Plaintiffs maintain that this Court's decision in *Arslanian v Oakwood United Hosps, Inc*, 240 Mich App 540, 550-551; 618 NW2d 380 (2000), supports their position that an arbitration clause must explicitly reference or incorporate statutory claims in order for such claims to be arbitrable.

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[2] The dissent primarily relies on *Kaleva-Norman-Dickson Sch Dist No 6,Cos of Manistee, Et Al v Kaleva-Norman-Dickson Sch Teachers'Ass'n*, 393 Mich 583; 227 NW2d 500 (1975). While we recognize that the Court in *Kaleva-Norman-Dickson* used expansive language in regard to the scope of an arbitration clause, we note that the analysis in that case was in reference to factual circumstances that are distinguishable from the instant case. In *Kaleva-Norman-Dickson*, the Court was interpreting an arbitration provision contained in a collective bargaining agreement that was itself at the heart of the parties' dispute. There was no earlier or subsequent agreement in controversy. The dissent also concludes that the analysis in *The Vestry and Church Wardens of the Church of the Holy Cross v Orkin Exterminating Co, Inc*, 356 SC 202; 588 SE2d 136 (2003) provides useful direction in the context of this case. Judicial decisions from foreign jurisdictions are not binding on Michigan courts, but may be persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006). In *Vestry and Church Wardens*, the issue was whether a dispute between the parties was subject to arbitration. *Id.* at 205. The parties originally contracted for pest-removal services in 1975, and later contracted for the same services in 2000; the 2000 contract contained a broad arbitration clause. *Id.* The Court found that the claims were subject to arbitration because the claims related to the subject matter of the 2000 contract, and the church was aware of its potential claims at the time it entered into the 2000 contract. *Id.* at 212-213. In contrast, plaintiffs in this case were not aware of their potential claims against defendants when they entered into the purchase agreements containing the arbitration clause and plaintiffs' claims relate to artwork purchased pursuant to agreements that do not contain an arbitration clause. Moreover, the parties in *Vestry and Church Wardens* had an ongoing relationship with each other involving the same building, in the same place, involving the same subject matter. Plaintiffs in this case did not have an ongoing relationship with defendants as plaintiffs merely purchased allegedly unique artwork that happened to be sold by defendants; however, plaintiffs did not purchase the artwork from the same individual, and the artwork was purchased in varying years and from different locations. Accordingly, we do not find *Vestry and Church Wardens* persuasive because its facts are distinguishable from the instant case.

[3] We address this issue to resolve any question regarding which claims are within the scope of the arbitration clause for those sales that are subject to arbitration.

In *Arslanian*, this Court considered whether, in light of *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 122-123; 596 NW2d 208 (1999),[4] the plaintiff's discrimination and retaliation claims arising from the Civil Rights Act (CRA) were required to be brought during arbitration proceedings. *Id.* at 542. In *Arslanian*, this Court held that the CRA-based claims were not subject to arbitration because "arbitration proceedings must include clear notice to the employee that he is waiving the right to adjudicate discrimination claims in a judicial forum" and the agreement in *Arslanian* failed to provide notice. *Id.* at 551.

Accordingly, the holding in *Arslanian* requiring "clear notice," i.e. specific reference to statutory claims, is limited to CRA-based claims in an employment context. Nothing in the *Arslanian* opinion suggests that arbitration agreements must provide clear notice regarding any possible statutory claim that could arise between the parties. The conclusion that *Arslanian* does not stand for the proposition that all statutory claims in all contexts must be specifically incorporated by an arbitration agreement in order to be arbitrable is further supported by the fact that *Arslanian* relies on *Rembert*, which also focused specifically on CRA-based claims. See also *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 556; 682 NW2d 542 (2004) (noting that the holding in *Rembert* does not control because the case did not involve the arbitration of statutory civil rights claims).

Because there is no specific rule barring arbitration of plaintiffs' statutory claims, the arbitrability of those claims is determined by applying the three-part test set forth in *In re Nestorovski Estate*, 283 Mich App at 202. Factors one and three are not at issue; the parties do not dispute that there is an arbitration agreement in some of the invoice agreements, nor do the parties claim that statutory claims are expressly exempted from the arbitration agreement. In regard to the second factor, the arbitration agreement provides that the parties agree to arbitrate "any disputes or claims of any kind." Accordingly, we conclude that any statutory claims raised by plaintiffs in connection to sales made pursuant to invoice agreements containing the arbitration clause are subject to arbitration because statutory claims are clearly included in an agreement to arbitration "any disputes or claims of any kind."

In regard to the exclusion of their tort claims from the arbitration agreement, plaintiffs rely on the case of *Young v Mich Mut Ins Co*, 139 Mich App 600, 602-603; 362 NW2d 844 (1984), to support their argument that the arbitration agreement does not encompass the tort

[4] In *Rembert*, 235 Mich App at 122-123, this Court considered whether statutory claims arising under the Michigan Civil Rights Act and the Persons With Disabilities Civil Rights Act could be subject to arbitration. This Court concluded that "as long as no rights or remedies accorded by the statute are waived, and as long as the procedure is fair, employers may contract with their employees to arbitrate statutory civil rights claims." *Id.* at 123. *Rembert* explained that "predispute agreements to arbitrate statutory employment discrimination claims are valid if: (1) the parties have agreed to arbitrate the claims . . . (2) the statute itself does not prohibit such agreements, and (3) the arbitration agreement does not waive the substantive rights and remedies of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights." *Id.* at 156. In order to ensure fair arbitration procedures, employees must have clear notice that CRA-based claims are subject to arbitration. *Id.* at 166.

claims alleged by plaintiffs. In *Young*, the arbitration clause was part of an insurance contract and provided that any claims regarding legal entitlement to recover damages from the owner or operator of an uninsured automobile and claims stemming from disagreement regarding the amount of payment that is owed under the insurance contract would be settled by arbitration. *Id.* This Court held that the plaintiff's tort claim was accordingly not covered by the arbitration agreement because the claim did not involve the plaintiff's entitlement to benefits pursuant to the insurance policy. *Id.* at 603.

In this case, the arbitration agreement is much broader than the agreement in *Young*. Further, *Young* does not hold that tort claims, as a rule, are omitted from arbitration unless specifically referenced. Rather, *Young* merely looked to the plain language of the arbitration clause and determined that by its terms, tort claims were not included because the agreement to arbitrate was limited to specific types of disputes. In this case, the arbitration agreement includes "any disputes or claims of any kind." Accordingly, we conclude that plaintiffs' tort claims are arbitrable because the first and third factors determining arbitrability are not disputed in this case and plaintiffs' tort claims are arguably within the scope of the arbitration clause. *In re Nestorovski Estate*, 283 Mich App at 202.

III. WAIVER

Plaintiffs argue that even if their claims are within the scope of the arbitration clause, defendants waived their right to arbitration by filing motions to dismiss on the grounds of misjoinder and MCR 2.116(C)(8).

We review the trial court's factual findings for clear error, and we review de novo the trial court's decision whether those facts constituted a waiver of the right to arbitration. *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001).

Waiver of a contractual right to arbitrate is disfavored. *Id.* Waiver is implied "when a party actively participates in litigation or acts in a manner inconsistent with its right to proceed to arbitration." *Joba Constr Co, Inc v Monroe Co Drain Comm'r*, 150 Mich App 173, 178; 388 NW2d 251 (1986). The party claiming waiver has occurred bears the burden of demonstrating that the waiving party had knowledge of its existing right to compel arbitration, that the party engaged in acts inconsistent with the right to arbitrate, and that prejudice to the party asserting waiver resulted from the inconsistent acts. *Myers*, 247 Mich App at 588. Whether arbitration has been waived is determined by the particular facts of a case. *Id.*

In this case, the original 27 plaintiffs filed a complaint on June 22, 2010; defendants responded to plaintiffs' complaint by filing four separate motions to dismiss on July 14, 2010. One of defendants' four motions requested dismissal based on MCR 2.116(C)(7) for the reason that plaintiffs' claims were barred because the parties agreed to arbitration. Plaintiffs have not demonstrated that a motion requesting dismissal because the parties' claims are subject to arbitration is in any way a waiver of the right to arbitration. *Id.* at 588. Further, it is not disputed that some of the original 27 plaintiffs never signed an invoice agreement containing an arbitration clause; accordingly, defendants were required to participate in litigation in regard to the plaintiffs who never signed an arbitration agreement in order to defend against the claims of those plaintiffs. A party does not waive the right to arbitration by litigating an issue that is not

arbitrable. *Id.* at 589. Accordingly, defendants' motions for dismissal on the grounds of misjoinder and failure to state a claim upon which relief can be granted do not constitute actions inconsistent with defendants' right to arbitration when some of the plaintiffs never signed arbitration agreements and defendants also asserted their right to arbitration in regard to the plaintiffs who did sign such agreements.

We conclude that defendants did not waive their right to arbitration. The actions taken by defendants in this case were not inconsistent with their right to arbitration because all four motions to dismiss were filed together, and one of those motions specifically requested dismissal because the parties agreed to arbitration. Further, all the motions were argued together, and defendants specifically maintained that the parties were obligated to resolve their dispute through arbitration. Finally, there is no evidence to suggest that plaintiffs were prejudiced by defendants' actions, and plaintiffs do not argue that they were prejudiced. Accordingly, the trial court did not clearly err when it concluded that defendants' participation in the litigation did not constitute waiver of their right to arbitration.[5]

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Joel P. Hoekstra

[5] We note that plaintiffs also challenge the validity and enforceability of the arbitration clause itself for the first time on appeal. Plaintiffs did not contest the general validity of the arbitration agreements in the trial court, and challenged only the scope of the arbitration agreement. Although this Court may address an unpreserved issue if it involves a question of law and the facts necessary for its resolution have been presented, we decline to address the issues raised by plaintiffs challenging the validity of the arbitration clause because the necessary facts are not part of the record on appeal. *Royce v Chatwell Club Apartments*, 276 Mich App 389, 399; 740 NW2d 547 (2007).